Supreme Court, U.S.
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No. 94-2005

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

UNITED STATES OF AMERICA,
Petitioner,
v.
XEROX CORPORATION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Whether a United States foreign tax credit properly allowed to Xerox in 1974 under both the United States-United Kingdom Income Tax Treaty * and United States tax laws is disallowed in 1980 when Xerox' United Kingdom subsidiary surrendered to its own United Kingdom subsidiaries certain United Kingdom credits usable by them to satisfy their own liabilities for United Kingdom corporation tax.

Whether an appellate court may properly consider affidavits, which were introduced into the record at the trial court level in support of a timely motion for reconsideration, to corroborate the appellate court's interpretation of the language and purpose of a treaty.

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* Convention Between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and Capital Gains, December 31, 1975, as amended by exchange of diplomatic notes on April 13, 1976, First Protocol of August 26, 1976, Second Protocol of March 31, 1977, and Third Protocol of March 15, 1979, T.I.A.S. No. 9682, 31 U.S.T. 5668 (hereafter the "Treaty").

LIST REQUIRED BY RULE 29.1

Respondent, Xerox Corporation, Inc., is a publicly traded corporation and parent company of a consolidated group of corporations. Respondent's only subsidiary that has issued shares to the public is Xerox Canada, Inc.

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RESPONDENT'S BRIEF IN OPPOSITION

COUNTER STATEMENT OF THE CASE

Respondent Xerox Corporation (hereafter "taxpayer" or "Xerox"), does not agree with or finds incomplete certain portions of the Statement of the Petitioner (hereafter the "United States" or "government"). In particular, the government has not described adequately five significant aspects of the case. Consequently, in accordance with Rule 15 of the Rules of this Court, Xerox corrects and supplements the Statement of the government at pages 2-14 of its petition.

1. *Xerox' Unusual Corporate Structure in the United Kingdom.* The government refers to Rank Xerox Ltd. (RXL) in its petition (at p. 6) as "respondent's United Kingdom subsidiary." While Xerox owns somewhat more than the majority of the share capital of RXL, Rank Organization Plc. ("RO"), a large unrelated publicly held U.K. corporation, holds, directly and indirectly, the balance of the share capital in RXL (except for a few shares

owned by RXL employees). The same share ownership existed in 1974. Petitioner's Appendix [1] 37a and 38a.

RXL has, throughout its existence, been engaged in business in the Eastern Hemisphere essentially comparable to the principal business conducted by Xerox in the United States, which is the manufacture and sale of a wide range of copiers and duplicating machines. RXL has non-United Kingdom operating subsidiary corporations in most of the major countries of Europe and in many other parts of the Eastern Hemisphere, and also has United Kingdom (hereafter "U.K.") operating subsidiaries. Pet. App. 37a, Resp. App. 1a-2a.

It is quite unusual for a U.S. multinational corporation to have a U.K. corporation as the parent corporation for its European and other Eastern Hemisphere operating subsidiary corporations. This unusual business organization results from Xerox' long-standing joint business association in the Eastern Hemisphere with RO, which had operated from the U.K. for many years prior to the formation of RXL. RO played the lead role in RXL for many years. Resp. App. 14a.

As will be seen, this unusual corporate structure bears significantly on the question of whether the instant case should be reviewed by this Court. *Infra* p. 12.

2. *The Key Elements of the U.K. Finance Act of 1972.* During the years immediately preceding 1972, the U.K. taxed U.K. corporations such as RXL under a "classical system" of taxation (similar to that presently in place in this country). Under the classical system, a corporation income tax is imposed on the earnings of the corporation and a separate income tax is generally imposed on shareholders receiving dividends from such corporation. The classical system results in double taxation of such earnings—once at the level of the corporation

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[1] Hereafter, references to the government's appendix are cited as Pet. App., and references to Xerox' appendix are cited as Resp. App.

and a second time when the earnings are received by the shareholder in the form of a dividend.

The double taxation of corporate earnings distributed to shareholders can be eliminated or reduced in several ways. The simplest way to avoid double taxation of such earnings is either not to tax the corporate earnings or not to tax the dividend income. However, most countries that have adopted a tax system seeking to reduce the double taxation of corporate earnings have not chosen either of these simple approaches, but rather have adopted systems that "integrate" the taxation of a corporation and its shareholders.

In 1972, the U.K. adopted such an integrated system which had as its cornerstone the imposition of a new and separate tax—termed an "Advance Corporation Tax" (hereafter "ACT")—which is levied on corporations paying dividends to its shareholders. While it may be perceived as anomalous to impose an additional tax in order to reduce the double taxation of corporate earnings, the reduction of double taxation is realized by allowing both the corporation and its shareholders to reduce the corporate level and the shareholder level taxes, respectively, through credits equal to the amount of the ACT payment.

The U.K. legislation which adopted this integration system (hereafter the "U.K. Finance Act of 1972") is of considerable importance in this litigation and a basic understanding of its primary provisions is essential to an understanding of this case.[2] The three major components of the U.K. integration system are described below:

(a) Section 84 of the U.K. Finance Act of 1972 provides that a U.K. corporation must pay a tax to the U.K. which is calculated as a percentage of the dividends paid by such corporation to its shareholders. This tax on dividends, as noted previously, is the "Advance Corporation Tax" and is universally called ACT. ACT is a separate tax from and is independ-

[2] All of the relevant provisions of the U.K. Finance Act of 1972 are set forth at Resp. App. 3a-10a.

ent of the U.K. corporation tax. Pet. App. 31a. For example: (i) ACT is imposed on dividend distributions, whereas U.K. corporation tax is imposed on net income; (ii) the ACT rate in 1974 was three-sevenths (3/7) of dividends paid, whereas the corporation tax rate was 52% of net income; (iii) the tax return for ACT is due and payable at the end of each quarter, whereas the return for U.K. corporation tax is due either 9 or 18 months following the close of the accounting period and much of the tax is not payable until some time after that; (iv) ACT and corporation tax are separately audited by the Inland Revenue (the U.K. counterpart to our Internal Revenue Service). ACT is payable upon a dividend distribution even if the distributing corporation has no current liability for corporation tax and may never have any liability for corporation tax. Joint Stipulation Para. 23, Resp. App. 12a. A payment of ACT gives rise to the two separate U.K. credits or offsets described below—one at the corporate level and another at the shareholder level.

(b) Section 85 of the U.K. Finance Act of 1972 provides that a U.K. corporation that has paid ACT receives a credit which, subject to various limitations and restrictions, may be used to reduce its U.K. corporation tax liability. This credit against U.K. corporation tax is normally called the section 85 credit. Although a U.K. corporation that has paid ACT normally uses the section 85 credit itself, such a U.K. corporation may, under some circumstances, transfer (or "surrender") its section 85 credit to a controlled U.K. subsidiary corporation (*i.e.*, a "surrenderee") under section 92 of the U.K. Finance Act of 1972. The surrenderee-U.K. corporation may then apply such surrendered section 85 credit to reduce its (*i.e.*, the surrenderee's) own U.K. corporation tax and therefore would be liable to pay only a net amount of U.K. corporation tax (*i.e.*, the amount of U.K. corporation tax that is due after reduction by the section 85 credit).

(c) Section 86 of the U.K. Finance Act of 1972 provides that a U.K. shareholder who receives a

dividend from a U.K. corporation is entitled to a U.K. tax credit against the shareholder's U.K. income tax in an amount equal to the ACT payable on such dividend. This credit against the shareholder's tax liability is normally called the section 86 credit. The recipient of a dividend is required to report as income both the dividend and the section 86 credit. ACT is set at a rate so that the section 86 credit equals the basic income tax rate imposed on the sum of the dividend and the section 86 credit. In this manner, as shown in the example below, the section 86 credit can fully offset the U.K. shareholder's income tax liability on the total taxable dividend. Special rules apply to U.K. corporate shareholders which produce results comparable to those applicable to U.K. individual shareholders.

To illustrate the British integration system, assume a U.K. corporation had £100 of earnings in 1974 and paid a £25 dividend in 1974 to its U.K. individual shareholder (or shareholders). The results would be as follows:

First Tax—Payment of ACT (Section 84 of U.K. Finance Act of 1972)

1. Earnings	£100.00
2. Dividend	£25.00
3. ACT paid on dividend at 1974 rate (*i.e.* 3/7 of the dividend)	£10.71

Second Tax—Credit of ACT to Reduce U.K. Corporation Tax (Section 85 Credit)

4. British corporation tax before ACT credit (52% of line 1, *supra*)	£52.00
5. Section 85 credit for ACT	(£10.71)
6. Net U.K. corporation tax paid	£41.29

Third Tax—Credit of ACT to reduce U.K. Individual Tax (Section 86 Credit)

7. Cash dividend received	£25.00
8. Dividend increased by ACT amount	£10.71
9. Total taxable dividend	£35.71

10.	Shareholder tax on taxable dividend (at the 1974 U.K. basic[3] rate of 30% on taxable dividends)	£10.71
11.	Section 86 credit for ACT	(£10.71)
12.	Net shareholder tax	-0-

As can be seen from this example of the operation of the British tax law, the two separate credits based on the ACT payment reduce the taxes otherwise payable by both the corporation and its shareholders, and thereby accomplish the purpose of the integration system to reduce the double taxation of corporate earnings.

3. *The Treaty.* Non-resident shareholders were specifically excluded from the categories of shareholders entitled to receive the section 86 credit. One of the principal purposes of the U.S. negotiators in negotiating a new income tax treaty in the period following the passage of the U.K. Finance Act of 1972 was to obtain a shareholder-level tax credit for U.S. shareholders of U.K. corporations which was comparable to the tax benefits provided to U.K. shareholders under the U.K. Finance Act of 1972. This goal was accomplished by Articles 10(2) and 23(1) of the Treaty.

Under Article 10(2)(a)(ii) and (iii) of the Treaty, the U.K. agreed to give U.S. portfolio investors[4] full benefit of the U.K. section 86 shareholder credit in the form of a payment from the U.K. to the U.S. shareholder of an amount equal to the tax credit available to a U.K. shareholder under section 86 of the U.K. Finance Act of 1972, subject to a withholding tax of 15 percent imposed on the total of the dividend paid plus the Article 10(2) payment from the U.K.

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[3] The 3/7 rate of ACT in 1974 gave rise to a section 86 credit equal to 30% of the shareholder's total taxable dividend (*i.e.*, cash dividend plus section 86 credit).

[4] Portfolio investors are individuals, trusts, estates, partnerships and any corporation other than a 10% or more corporate shareholder.

Under Article 10(2)(a)(i) and (iii) of the Treaty, a U.S. corporation owning a share interest of 10 percent or more in a U.K. corporation paying a dividend (*i.e.*, a U.S. direct investor, such as Xerox) is entitled to receive a payment from the U.K. equal to one-half the amount of the section 86 shareholder credit which would be available to a U.K. individual shareholder under section 86 of the U.K. Finance Act of 1972, subject to a withholding tax of 5 percent imposed on the total of the dividend plus the Article 10(2) payment from the U.K. Article 23(1)(c) of the Treaty addresses the other half of the section 86 shareholder credit (*i.e.*, the half that is not paid directly by the U.K.) and provides that the U.S. will allow U.S. direct investors a U.S. foreign tax credit in an amount equal to the other one-half of the section 86 shareholder credit which is not paid by the U.K. to U.S. direct investors under Article 10(2)(a)(i).

To illustrate the effect of the Treaty on the example set forth at p. 5, *supra*, if the shares of the U.K. corporation were owned by a U.S. portfolio shareholder, then under Article 10(2)(a)(ii) of the Treaty, the U.S. portfolio investor would receive a full payment from the U.K. of £10.71, the exact same amount as the section 86 credit received by a U.K. individual shareholder.[5] The U.S. direct investor would receive £5.35 from the U.K. under Article 10(2)(a)(i) of the Treaty[6] and would receive the other half of the U.K. shareholder credit, or £5.35, as a U.S. foreign tax credit under Article 23(1) of the Treaty and the Internal Revenue Code. The Treaty, thus, effects a basic symmetry between U.K. shareholders of U.K. corporations and U.S. shareholders

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[5] As noted above, the U.K. would impose a 15% withholding tax on the amount of the dividend (£25.00) plus the amount of the ACT refund (£10.71)—a withholding tax of £5.35—but this withholding tax would be a "wash" to most U.S. portfolio investors because, while it would be collected by the U.K., it would give rise to a full credit against the shareholder's U.S. income tax liability.

[6] This is subject to a 5% withholding which also would be a "wash" for most U.S. direct investors. *See* footnote 5.

of such corporations. U.K. shareholders receive their section 86 credit in the year ACT is paid. U.S. portfolio investors, under Article 10 of the Treaty, receive a direct payment from the U.K. in the full amount of the section 86 credit in the year ACT is paid. U.S. direct investors receive a direct payment from the U.K. equal in amount to one-half of the section 86 credit in the year ACT is paid and receive a U.S. foreign tax credit equal in amount to the other one-half of the section 86 credit. It is this U.S. foreign tax credit, which is equal in amount to the other one-half of the section 86 credit, that is at issue in this litigation.

4. *The Decision Below.* During 1974, RXL declared and paid dividends to its shareholders of £14,000,000. Under section 84 of the U.K. Finance Act of 1972, RXL was required to pay, and did pay, ACT of £6,000,000 with respect to such dividends. Pet. App. 50a.

RXL was able to use only a small portion of its section 85 ACT credit, generated by its 1974 ACT payment of £6,000,000, to reduce its own 1974 U.K. corporation tax liability. RXL was unable to use a major portion of its section 85 credit because a major portion of RXL's taxable income consisted of dividends from non-U.K. operating subsidiaries. These dividends gave rise to U.K. foreign tax credits. In order to use efficiently its own U.K. foreign tax credits, RXL was forced to transfer (*i.e.*, surrender) for U.K. tax purposes a major portion of its section 85 credit to certain of its U.K. subsidiaries. Accordingly, of RXL's £6,000,000 section 85 credit generated by its 1974 ACT payment, RXL used £1,592,145 as a section 85 credit against its own 1974 U.K. corporation income tax, and then in 1980 it surrendered the balance of its section 85 credit of £4,407,855 to qualifying U.K. subsidiaries. Pet. App. 50a. This surrender of RXL's section 85 credit did not alter RXL's liability for ACT arising out of its 1974 dividend distribution, and the surrender did not result in any refund of ACT to RXL. Pet. App. 28a; Resp. App. 11a and 12a.

The Internal Revenue Service allowed Xerox in 1974 an appropriate amount of U.S. foreign tax credits under the Treaty and under section 902 of the Internal Revenue Code[7] for its share of the £1,592,145 ACT payment which was not surrendered by RXL. This amount of U.S. foreign tax credit is not in dispute. The Internal Revenue Servce initially also allowed Xerox in 1974 an appropriate amount of U.S. foreign tax credit under the Treaty and the Code for its share of the balance of RXL's ACT (£4,407,855), but reversed this allowance when in 1980 RXL surrendered this portion of its 1974 section 85 credit. To date, the Internal Revenue Service has not allowed any U.S. foreign tax credit to Xerox in any year with respect to this balance of RXL's ACT payment. It is only Xerox' claim for a U.S. foreign tax credit with respect to this latter amount that is in dispute.

Xerox filed suit in the United States Claims Court (hereafter "Claims Court") seeking a refund based on the allowance of a U.S. foreign tax credit in 1974 with respect to its share of the £4,407,855 of the 1974 ACT payment for which the section 85 credit had been surrendered by RXL to its U.K. subsidiaries. The Claims Court decided in favor of the government. Xerox appealed that decision to the Federal Circuit, and a unanimous three judge panel of the Federal Circuit reversed.

5. *The Introduction of Affidavits.* The decision of the Federal Circuit cited affidavits of certain individuals who had been U.K. ministers or U.S. officials during the time the Treaty was negotiated and ratified by each sovereign state. These affidavits had been obtained by Xerox in response to, and in an effort to counter, statements in the final post-trial reply brief of the government in the trial court wherein it asserted that the U.K. had "explicitly accepted" the position of the United States in this

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[7] Unless otherwise indicated, any further references to U.S. foreign tax credit provisions are references to sections 901 through 905 of the Internal Revenue Code of 1954, as in effect for 1974 (26 U.S.C. §§ 901-905) (the "Code").

case.[8] Post Trial Reply Brief of the United States, Jan. 14, 1988, at 3. Resp. App. 13a. Xerox believed, and the affidavits confirm, that the U.K. did not agree with the position espoused by the government in its brief.

While Xerox objected to the government's assertion that the U.K. agreed with the U.S. construction of Article 23 of the Treaty, Xerox was unable to gather the necessary corroborating evidence from the responsible U.K. ministers and former U.S. negotiators within ten days of the decision as required by Rule 83.2(f) of the Rules of the Claims Court. Consequently, Xerox was obliged to delay its motion for reconsideration until judgment was entered.[9] While a decision on the ACT issue had been rendered by the Claims Court in March of 1988, judgment could not be entered at that time because another issue remained in dispute which could only be resolved after the Treasury issued relevant regulations. The parties obtained an open-ended stay of the proceedings pending issuance of such regulations. Xerox and the Claims Court waited more than four years for the Treasury to issue these regulations, but, ultimately, Xerox was forced to concede this other issue in order to proceed with its motion for reconsideration. Xerox filed its motion for reconsideration, based in part on these affidavits, on November 9, 1992, just four days after the judgment was entered.

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[8] The Claims Court's decision is premised on the notion that the U.S. and the U.K. were in mutual agreement as to the construction of Article 23(1) underlying the government's position, and that, under decisions of this Court, where both parties to a treaty agree as to its construction, a lower court should not upset such construction. Pet. App. 65a.

[9] R.U.S.C.C. 59(a) allows the filing of a motion for reconsideration within 10 days of the entry of judgment. *See also* Fed. R. Civ. P. 59(a).

REASONS FOR DENYING THE PETITION

I. THIS CASE DOES NOT COME WITHIN THIS COURT'S STANDARDS FOR REVIEW ON WRIT OF CERTIORARI.

It is submitted there are no reasons or factors in this case that support review by this Court under Supreme Court Rule 10 or any other standards applied by this Court in granting a petition for writ of certiorari.

A. *There Are No Conflicting Decisions.* There are no conflicting decisions from this Court or lower courts. On the contrary, the only other case that has addressed Article 23(1) of the Treaty and the Treasury Technical Explanation [10] of that article is consistent with the Federal Circuit decision in this case. *Snap-On Tools v. United States*, 26 Cl. Ct. 1045 1992), *aff'd*, 26 F.3d 137 (Fed. Cir. 1994).

The *Snap-On Tools* case is not only consistent with the Federal Circuit decision below, but it is also highly relevant for another reason. In that case, as in this, the government's argument was premised on the Treasury's Technical Explanation of Article 23 and on the Senate's alleged acceptance of that Technical Explanation. The government argued in the alternative that its position was supported by the rules under section 902 of the Code. In the *Snap-On Tools* case, as in this, affidavits of former Treasury officials were introduced to explain the background and meaning of Article 23(1) of the Treaty. The same person was counsel for the government in both cases. When the Claims Court decided *Snap-On Tools* for the taxpayer and rejected both the Treasury's Technical Explanation of Article 23(1) and the government's position under section 902, the government appealed on its section 902 argument, *but did not appeal on its Treaty argument*. It did not appeal the adverse decision with respect to its reliance on the Technical Explanation of

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[10] Technical Explanation of the United States-United Kingdom Income Tax Convention, Department of Treasury, July 1977, *reprinted in* 1980-1 C.B. at 455.

Article 23(1), even though the Technical Explanation clearly and unequivocally addressed and supported its position. This is dramatic evidence that the government itself does not consider its interpretation of Article 23(1) of this Treaty or a court's failure to follow the Technical Explanation of that article to be a matter of any real importance. If the government is not prepared to appeal an adverse decision on its position under Article 23(1) and the Technical Explanation when it is appealing a case on other grounds, why should the government expect this Court to consider the interpretation of Article 23(1) or the weight given to the Technical Explanation to be at the high level of importance required for review by this Court on writ of certiorari?

B. *This Decision Will Only Apply to a Very Small Number of Taxpayers.* As noted previously, due to Xerox' unusual structure of organizing all of its Eastern Hemisphere operations as subsidiaries of RXL (at the insistence of its U.K. co-venturer, RO), RXL had a large inflow of dividend income from non-U.K. subsidiaries. The interplay of the British foreign tax credit and the secton 85 credit under U.K. law made it necessary for RXL to surrender most of its section 85 credit in order not to lose the benefit of these credits. Resp. App. 14a-16a. During the twenty-two year period that the U.K. integration system and the terms of the Treaty have been effective (1973-1995), Xerox has found only one or two other U.S. corporations which operate any significant portion of their non-U.K. foreign operations through a U.K. subsidiary and even these one or two corporations have not indicated to Xerox any interest in this case.

As stated by both parties, the issue in this case is the consequence of a surrender of U.K. section 85 credit. However, there is no evidence in the record and no reason to conclude that a surrender of section 85 credit by U.K. subsidiaries of U.S. parent corporations is normal or usual. On the contrary, the very document on which the government relies in this litigation (the Treasury Technical Explanation) shows that most U.S. corporate

shareholders are not concerned with this issue at all because U.K. subsidiaries use their section 85 credit in the year ACT is paid. The Technical Explanation states that generally U.K. corporations that pay ACT on dividend distributions will apply their section 85 credit in reduction of their own U.K. corporation tax in the year the Act is paid.[11] Further evidence that the surrender of section 85 credit is unusual is that there is not even a mention of the surrender possibility in the terms of the Treaty, in the Technical Explanation or in the extensive record of the Senate's consideration of this Treaty. Surely, if the surrender situation were other than an unusual situation, it would have received some attention in the Treaty itself or at least in the Treasury's presentation of the Treaty to the Senate.

Compelling evidence that this decision will have limited application is the complete absence of any pending litigation on this issue. After more than twenty-two years of operation of the Treaty, there is to the best of Xerox' knowledge not a single pending case other than this one. The government cites no pending cases. Since 1985, the Xerox case has been a matter of public record; yet no other taxpayer has filed suit. The government does not even seem to know of any pending claims.[12] This is

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[11] Footnote to Example 1, Technical Explanation of Article 23 states: "It is assumed in this example, *as is generally the case*, that ACT is fully creditable against mainstream tax." (Emphasis added.) As this example shows, mainstream tax is the current U.K. corporation tax of the payor of ACT.

[12] Contrary to his usual practice in petitions for writ of certiorari in tax cases, the Solicitor General does not provide any information with respect to pending claims and has made only speculative claims of the amounts of tax that may be involved. It is interesting to contrast the government's petition for writ of certiorari in *United States v. Goodyear Tire & Rubber Co.*, 493 U.S. 132 (1989), a case also involving U.S. foreign tax credits, in which the Solicitor General stated: "A preliminary survey of IRS field offices indicates that, in cases currently under audit, there are about 30 refund claims based on the decision in this case that have been, or will be, filed—totalling about $150 million. In addition, the IRS estimates as a result of communications with other taxpayers,

powerful evidence that the decision has quite limited relevance.

C. *The Federal Circuit's Decision Threatens No Significant Detriment to the Fisc.* Since this decision is of quite limited relevance, there is no reason to believe that it will have a "significant effect on the public fisc." Pet. 21. In support of its assertion, the government cites only overall amounts of foreign income taxes deemed paid by U.K. subsidiaries from the Statistics of Income Bulletin, but provides no information about what portion is ACT paid by U.K. subsidiaries of U.S. investors (undoubtedly a small portion) or what portion, *if any*, of U.S. foreign tax credits under Article 23(1) of the Treaty involves shifting of section 85 credits.[13]

In fact, the government maintains that its theory will not deny U.S. foreign tax credits at all, but will just shift such credits from one year to another year. While there are some factors that might affect the amount of U.S. foreign tax credits depending upon the year in which the U.S. credit is allowed (*e.g.*, differing tax rates in different years, the amount of dividends paid in different years, etc.), these factors are as likely to result in lower credits as they are in higher credits.

D. *The Government's Stipulations Make This Case a Poor Candidate for Supreme Court Review.* The government's position on the merits of this case depends, *inter alia*, on two propositions. First, the government claims that ACT "is finally allowable [as a United States foreign tax credit] in the year that the 'advance' tax is in fact applied to satisfy the 'corporation tax' liability."

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that another 150 refund claims totalling $750 million will be filed in reliance on the decision below." *Goodyear, supra*, Petition of the United States (March 8, 1989).

[13] The government may be suggesting that the Federal Circuit's decision will open the door to "double credits" and a consequent drain on the fisc. As shown below (*infra* p. 20), the government's double credit anomaly is totally unfounded and the Federal Circuit correctly perceived the government's contention as a mere "spectre." Pet. App. 26a.

Pet. p. 19; *see also* pp. 15 and 16 (footnote 13). Throughout its petition, the government describes ACT in terms which are equivalent to an estimated payment of corporation tax. However, ACT is a separate and distinct tax, and, consistent with this fact, the parties to this litigation have stipulated that "ACT is not an 'estimated tax' payment and is not similar to U.S. corporate estimated tax payments." Resp. App. 12a.

Second, the government's position depends on treating ACT as being refunded to the payor of such ACT at the time when a section 85 credit is surrendered under U.K. law. The parties have stipulated, however, that ". . . ACT paid by a distributing corporation is not refundable by the U.K. to the corporation making the qualifying distribution or to the shareholders of such corporation." Resp. App. 11a, *see also* Resp. App. 12a.

These two stipulations, which are themselves perfectly consistent with the applicable provisions of U.K. law, undermine the position of the government in this case and thus bear directly on the question of whether this Court should grant review of this case.

As this Court noted in *Newark Morning Ledger Co. v. United States*, 507 U.S. —, 123 L.Ed.2d 288, at 306 (1993), the taxpayer's "burden in this case was made significantly lighter by virtue of the Government's litigation strategy" in entering into a stipulation that foreclosed the government from making arguments in conflict with its stipulation.

E. *The Government's Position Is Inequitable.* The uncontroverted purpose of the Treaty was to benefit U.S. shareholders of U.K. corporations by giving such shareholders benefits which were comparable to those received by U.K. shareholders under the U.K. Finance Act of 1972. The government's position denies this benefit to Xerox solely because of a surrender of section 85 credits by its U.K. subsidiary. U.K. shareholders always receive their credits in the year ACT is paid (1974 in this case), regardless of a surrender of section 85 credits. U.S. port-

folio investors always receive their Article 10 payment in the year ACT is paid, regardless of a surrender of section 85 credits. U.S. direct investors always receive their Article 10 payment in the year ACT is paid, regardless of a surrender of section 85 credits. Most U.S. direct investors receive their Article 23 credits in the year ACT is paid. However, in the case of a surrender, the government's position denies the relief bargained for in Article 23 of the Treaty (*i.e.*, the Article 23(1) credit in the year ACT is paid). Moreover, in this case, the Internal Revenue Service has not allowed Xerox any U.S. foreign tax credit in any year for its portion of the £4,407,855 of ACT paid by RXL in 1974.[14]

Surely, the Treaty, which was negotiated to provide benefits to U.S. shareholders, cannot sensibly and equitably be interpreted to produce a situation in which Xerox gets no credit at any time for creditable taxes paid in 1974 and never refunded.

II. THE GOVERNMENT'S ATTACK ON THE DECISION OF THE FEDERAL CIRCUIT IS NOT WELL BASED.

A. *The Decision of the Federal Circuit Is Sound and Correct.* The parties agree that the only issue on the merits in this litigation is whether RXL's surrender in 1980 of its section 85 credit for ACT paid in 1974 reverses the 1974 tax credit that both parties agree is otherwise allowable to Xerox under Article 23(1) of the Treaty and U.S. tax law. *See* Pet., Questions Presented,

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[14] The government maintains that Xerox could have received credit for these taxes in 1980 or in some later year if the surrenderee had paid out its earnings as a dividend to RXL in the year the surrendered ACT credit was applied to reduce the surrenderee's U.K. corporation liability and if RXL had then passed these dividends along to Xerox. However, a 1980 dividend by RXL to Xerox would have subjected RXL to another ACT in 1980 and, under the government's theory, Xerox would have received no credit for that tax payment because RXL also would have had to surrender its 1980 section 85 credit. The government position leaves Xerox in a "Catch-22" situation.

p.(I) and also p.14. Xerox maintains and the Federal Circuit agreed that there is nothing in either the language or the purpose of the Treaty or in U.S. tax law which supports or justifies reversing the Article 23(1) credit at the time when the U.K. payor of ACT surrenders its section 85 credit for purposes of section 92 of the Finance Act of 1972.

In deciding this case, the Federal Circuit applied the legal standards which have been developed and often repeated by this Court in interpreting treaties. The Federal Circuit stated:

> "In construing a treaty, the terms thereof are given their ordinary meaning in the context of the treaty and are interpreted in accordance with that meaning, in the way that best fulfills the purpose of the treaty. . . . Unless the treaty terms are unclear on their face, or unclear as applied to the situation that has arisen, it should rarely be necessary to rely on extrinsic evidence in order to construe a treaty, for it is rarely possible to reconstruct all of the considerations and compromises that led the signatories to the final document."

Pet. App. 10a.

The Federal Circuit cited and stated its reliance on this Court's opinions in *United States v. Stuart*, 489 U.S. 353 (1989), *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176 (1982), *Maximov v. United States*, 373 U.S. 49 (1963), *Kolovrat v. Oregon*, 366 U.S. 187 (1961), and *Valentine v. United States*, 299 U.S. 5 (1936). The opinion of the Federal Circuit applies these uncontroverted authorities in interpreting the language and purpose of the Treaty.[15]

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[15] Since the Federal Circuit decided in favor of Xerox on its argument relating to the Treaty's language and purpose, that court did not need to address any of Xerox' three alternative grounds. If this Court should grant the government's petition for writ of certiorari, Xerox will present these three alternative grounds.

The stated purpose of Article 23(1) is the elimination of double taxation on U.K. corporate dividend distributions to U.S. shareholders. Pet. App. 11a. The language of the Treaty carries out this purpose. While all the terms of the Treaty are to be considered, the governing provisions are Articles 10(2)(a)(i) and 23(1). Article 10(2)(a)(i) provides that a U.S. corporation that is a direct investor in a U.K. corporation paying a dividend "shall be entitled to a payment from the United Kingdom of a tax credit equal to one-half of the tax credit to which an individual resident in the United Kingdom would have been entitled had he received the dividend" (*i.e.*, the section 86 credit). Article 23(1)(c) provides that "that amount of tax credit referred to in paragraph (2)(a)(i) of Article 10 (Dividends) which is not paid to the United States corporation but to which an individual resident in the United Kingdom would have been entitled had he received the dividend shall be treated as an income tax imposed on the corporation paying the dividend."

The government argues, however, that it is the timing of the credit provided by Article 23(1) of the Treaty that is in issue, and for this timing issue one looks to U.S. law, particularly to sections 901, 902 and 905 of the Code. "It is thus to United States law, not to the Treaty itself, that we are to look to determine the proper timing of this tax credit." Pet. 17. Neither the Federal Circuit nor Xerox disagrees that the timing is determined by U.S. law. The Federal Circuit addressed this point directly and clearly. Pet. App. 26a-29a. It sets forth the government's position under sections 901, 902 and 905, but concludes: "We do not share this reasoning." Pet. App. 28a. The Federal Circuit held that: "[i]n accordance with sections 901 and 902 [*i.e.*, under U.S. law], Xerox was entitled to the credit when the dividends were distributed to Xerox and the ACT thereon was paid or accrued by RXL, see § 905." Pet. App. 28a.

Paradoxically, the government's position would have the timing of the credit under U.S. law depend upon U.K.

law. The government would shift the timing of the U.S. foreign tax credit for a U.S. direct investor if the U.K. payor of ACT surrenders its U.K. section 85 credit under U.K. law (section 92 of the U.K. Finance Act of 1972). But looking to U.K. law to determine the timing of U.S. foreign tax credits is in direct conflict with this Court's decisions in *United States v. Goodyear Tire & Rubber Co., supra,* and *Biddle v. Commissioner,* 302 U.S. 573 (1938).

B. *The Government's Position on the Merits Is Grounded on Several Material Erroneous Premises.* There is nothing in either the language or the purpose of the Treaty that supports the government's convoluted and complex position under which Xerox is originally allowed a credit in 1974 and then is denied a 1974 credit when a U.K. section 85 credit is surrendered under U.K. law by RXL in 1980. This position of the government is not only inconsistent with the language and purpose of the Treaty, but is dependent upon three premises—each of which is flawed:

(a) The government states that "Articles 23(1)(a) and 23(1)(c) of the Treaty contain a potential anomaly." Pet. 15. This asserted "potential anomaly" arises because the government alleges that Article 23(1)(a) of the Treaty provides for a U.S. foreign tax credit for *gross* U.K. corporation tax (*i.e.*, unreduced by the section 85 credit) and not just for the net amount of U.K. corporation tax actually paid by the surrenderee. However, this contention is contrary to the clear language of the Treaty. Article 23(1) states *four* separate times that the U.S. credit allowable under Article 23(1) is limited to *tax paid to the United Kingdom*—not U.K. tax satisfied with credits or tax deemed paid.[16]

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[16] This point is made clear in Article 23(1) by constant repetition:

> In accordance with the provisions and subject to the limitations of the law of the United States . . . , the United States shall allow to a resident or national of the United States as a credit against the United States tax the appropriate amount

(b) The government alleges that the Xerox position could permit a double U.S. foreign tax credit under Article 23(1) and based on this allegation asserts that Xerox' position must be wrong. Pet. 9 and 16. This allegation is not true and the government has expressly recognized this fact in its brief before the Claims Court and in its brief before the Federal Circuit. *See* Resp. App. 17a for the relevant quotations from each of these briefs.

The position of the Federal Circuit and Xerox can *never* result in double credits for *any* U.S. shareholder under *any* circumstance because this position follows the Treaty language and only allows U.S. credits for *tax paid to the United Kingdom.* In this case, this means a U.S. credit in 1974 based on ACT paid by RXL in 1974 and a U.S. credit in 1980 for the *net* U.K. corporation tax actually paid by the surrenderee in 1980.

The government's often repeated allegations of potential double credits is also definitively rebutted by its own regulations. Treasury Regulation section 1.901-2(e)(4) directly addresses this double crediting allegation asserted by the government and provides that no double crediting is allowed or allowable. This regulation provides that a tentative liability for one levy (*e.g.*, U.K. corporation tax of a surrenderee) which is or can be reduced by a liability for a different levy (*e.g.*, ACT) is considered paid for U.S. foreign tax credit purposes only to the

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of *tax paid to the United Kingdom.* And in the case of a United States corporation owning at least 10 percent of the voting stock of a corporation which is resident of the United Kingdom from which it receives dividends in any taxable year, the United States shall allow credit for the appropriate amount of *tax paid to the United Kingdom* by that corporation with respect to the profits out of which such dividends are paid. Such appropriate amount shall be based upon the amount of *tax paid to the United Kingdom* . . . . For purposes of applying the United States credit in relation to *tax paid to the United Kingdom*:

(a) . . . .

(b) . . . .

(c) . . . (Emphasis added.)

extent of the *net* payment of the tentative levy (*i.e.*, U.K. corporation tax as reduced by the section 85 credit).[17] Resp. App. 18a. Under this regulation, ACT is treated as a tax paid to a foreign country for purpose of applying the U.S. foreign tax credit rules of sections 901 and 902 of the code, and only the amount of U.K. corporation tax in excess of the amount satisfied by the section 85 offset is also treated as a tax paid to a foreign country.[18] *See also Helvering v. Queen Insurance Co.*, 115 F.2d 341 (2d Cir. 1940), *cert. denied*, 312 U.S. 706 (1941), and Revenue Ruling 69-468, 1969-2 C.B. 150. Thus, under the Treasury's own regulations and these other authorities, there can be no double crediting under Xerox' position or the Federal Circuit's decision.

(c) The government claims that section 905(c) applies to "deemed" refunds. However, section 905(c) applies to actual refunds of foreign tax and not to alleged or deemed refunds. Pet. App. 29a-31a; *see also* Treasury Regulation section 1.905-3T(c). The parties have stipulated that "ACT is not refundable". Resp. App. 11a and 12a. Yet the government's position depends upon treating a surrender of section 85 credit as a refund of the ACT paid by the surrenderor. Revenue Procedure 80-18,

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[17] These regulations, which were published in final form on October 7, 1983, were made applicable to earlier years at the election of taxpayers and certainly apply to any cases arising after that date, which would be all cases that could now be brought under the Federal Circuit decision.

[18] Since its pre-trial opening brief when the government became aware that its regulations are in conflict with its litigating stance, it has simply ignored its own regulations. Since these regulations had their origin in *Helvering v. Queen Insurance Co.*, *infra*, the government's only response has been to assert that that case is limited to facts involving the application of a non-creditable tax against a creditable tax. *See, e.g.*, Pet. 20, footnote 17. However, the reasoning of the Second Circuit is not so limited and, even more importantly, the regulations are not so limited. Further, in Rev. Rul. 69-468, *supra*, the Service itself applied the *Queen Insurance* rationale where, as here, one creditable foreign income tax could be applied in reduction of another creditable foreign income tax.

section 3.05, 1980-1 C.B. 623. Throughout the long history of this litigation, Xerox has constantly challenged the government to cite any authority for its position that section 905(c) applies to deemed refunds. The government has never done so.

C. *The Government's Heavy Reliance on Post-Treaty Interpretations Is Not Availing in This Case.* The government seeks to maximize the relevance of certain post-negotiation interpretations and to minimize the relevance of the language and purpose of the Treaty. These post-negotiation interpretations are the revised Treasury Technical Explanation, Revenue Procedure 80-18, *supra,* and a 1986 Competent Authority Agreement. Each of these must be considered separately.

While a Treasury technical explanation of a treaty does deserve considerable weight, it cannot alter the clear language of a treaty. *Valentine v. United States, supra.* Furthermore, this particular Technical Explanation has a number of problems that largely eviscerate its relevance. These include:

- The issue in this case is the consequence of a surrender of the section 85 credit for ACT. The Technical Explanation does not address this issue.
- The Treasury Department published its original Technical Explanation of Article 23 in March 1977 (after careful consideration over 15 months) and then, in a most unusual action, withdrew that and published a dramatically different revised Technical Explanation of Article 23 in July 1977 without providing any public explanation for its dramatic shift.
- The Senate Committee on Foreign Relations expressed reservations about this revised Technical Explanation's exegesis of the interplay between Article 23(1) and the provisions of U.S. law regarding the foreign tax credit. Resp. App. 19a.
- The Competent Authority of the U.K. has declined to support the Technical Explanation. Resp.

App. 21a-24a and 25a-26a. *See also* discussion of Competent Authority Agreement immediately *infra*.

- This Technical Explanation was criticized and not followed by the Claims Court in *Snap-On Tools v. United States, supra,* 26 Cl. Ct. at 1072, and the government did not appeal this ruling.

With regard to Revenue Procedure 80-18, little weight is to be given to revenue procedures. *State Bank of Albany v. United States,* 530 F.2d 1379 (Cl. Ct. 1976); *Crow v. Commissioner,* 85 T.C. 376 (1985). This Court has held that a revenue procedure is generally accorded no more weight than the contention of one of the parties. *Biddle v. Commissioner, supra, at* 582. Also, when this revenue procedure was issued, it was acknowledged by high ranking officials of Treasury and the Internal Revenue Service that this revenue procedure might well be in conflict with this Court's decision in *Biddle.* Resp. App. 27a-29a. Furthermore, this revenue procedure has been rejected in the other two decisions that have considered it. *Snap-On Tools v. United States, supra,* and *Brown & Williamson, Ltd. v. United States,* 688 F.2d 747, 752 (Cl. Ct. 1982), *acq'd* Revenue Ruling 84-133, 1984-2 C.B. 309.

Each party claims that the 1986 Competent Authority Agreement (hereafter "CAA") supports its position. The CAA, which is a letter exchange between the U.S. and the U.K. competent authorities, is set forth at Pet. App. 24a-25a.

The background of the CAA is relevant because that background undermines the government's reading of the CAA as supportive of its position. On April 18, 1986, the Inland Revenue sent its written position on this Xerox litigation to the Internal Revenue Service. Although the Inland Revenue recognized that its letter was subject to discovery in this litigation, the U.S. government refused to disclose the contents of this letter on the grounds it was a "state secret" and launched a court-approved effort to obtain a competent authority agreement for use in this litigation in lieu of disclosing the Inland Revenue letter of April 18, 1986. The Claims Court set a deadline of

December 31, 1986 for completion of this process and indicated that absent a competent authority agreement by that date, it might require the government to release the Inland Revenue letter of April 18, 1986 to Xerox. The exchange of letters constituting the CAA did not occur until late December, 1986.

The CAA contains no support for the government's key arguments. First, the CAA does not even mention the surrender issue which the parties agree is the sole issue in this case. Second, there is no support for the government's claims that Article 23(1)(c) provides a credit on only a provisional basis and that Article 23(1)(a) provides the permanent credit. Third, there is no support for, or even mention of, the Treasury Technical Explanation or Revenue Procedure 80-18. Certainly, if the U.K. had been willing to say anything helpful to the U.S. position on any of these key matters, it would have been in the CAA, which was written by the U.S. after two meetings with U.K. representatives and a six-month gestation period.

The government states that "the court of appeals dismissed the Competent Authority Agreement . . . ." Pet. 13. This is not so. The Federal Circuit interpreted the CAA as being perfectly consistent with the language and purpose of the Treaty, stating "[w]e discern no substantial change from the treaty provisions. The Agreement summarizes the Treaty purpose and its implementation as applied to ACT, deplores the taking of double credit in the United States, and confirms that United States law applies to the timing of the credit." Pet. App. 25a. The Federal Circuit concluded that: "[t]he omission from the Agreement of the positions taken in this Revenue Procedure and the earlier Technical Explanation appear to us to emphasize the weaknesses in the government's argument." Pet. App. 26a.

For each of the above reasons, the Federal Circuit decision, which is based on the language and purpose of the Treaty, is sound and that decision gives appropriate consideration to the Technical Explanation, Revenue Procedure 80-18 and the CAA.

III. THE GOVERNMENT'S EXPRESSED CONCERN ABOUT THE FEDERAL CIRCUIT'S REFERENCE TO AFFIDAVITS IS MISPLACED.

The government's second question presented is whether certain affidavits submitted to the trial court with Xerox' motion for reconsideration, filed November 9, 1992 (hereafter "motion"), "may properly be considered as part of the evidentiary record of this case in evaluating the intent and course of dealings of the treaty signatories." The government asserts that this question is of substantial administrative importance because use of affidavit evidence "would interfere with the proper functioning of treaty relations and would be an irritant in the administration of treaty affairs." [19] Pet. 15.

There are three independent reasons why the government's contention raises no grounds for granting the government's petition.

A. *The Federal Circuit's Holding Is Not Grounded on These Affidavits But on the Language and the Purpose of the Treaty.* Even if the affidavits represent the sort of evidence which might implicate an important question of treaty relations and administration, there is no basis for granting writ of certiorari in this case as the Federal Circuit's decision did not rely on such evidence for its holding.

The Federal Circuit based its decision on the language and purpose of the Treaty, finding the meaning of Article 23 to be "plain and unambiguous." Pet. App. 31a.

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[19] The government's petition reveals the government's quite flexible views in this regard. Footnote 9 on page 11 of the petition refers to evidence by affidavit allegedly showing that U.S. and U.K. representatives communicated concerning the provisions of the Technical Explanation. The evidence referred to is the affidavit of Stephen P. Hannes, a former U.S. government official, which states that the Technical Explanation "would have been sent" to the U.K. Inland Revenue. Pet. App. 57a. The government's double standard in this regard is also made plain by the government's own introduction of Mr. Hannes' affidavit in the *Snap-On Tools* case before any such affidavits were introduced by Xerox in this case.

The various points at which the affidavits in issue are cited by the Federal Circuit represent merely that court's consideration of these affidavits as corroborating the clear language and purpose of the Treaty. Pet. App. 14a ("Affidavits of negotiators for both sides were in accord with each other and with this purpose."); Pet. App. 15a. ("These statements are consistent with the clear text of the treaty and its purpose of avoiding double taxation of dividends.") As the second paragraph of the discussion portion of its opinion makes plain, the Federal Circuit did not "rely on extrinsic evidence in order to construe [the] treaty," but merely reviewed such material to aid in its "understanding [of] the treaty and its purposes, thus providing an enlightened framework for reviewing its terms." Pet. App. 10a.

Furthermore, the Federal Circuit disposed of the government's position in this case, which is that the timing of the U.S. foreign tax credit under sections 901, 902 and 905 is 1980, in a separate portion of its opinion in which there is not any reference to affidavits at all. Pet. App. 26a-31a.

B. *The Affidavits in Question Were Properly Admitted for the Purposes for Which They Were Cited.* In substance, the government's position on this second question is that the affidavits in issue were not in the record, were hearsay not subject to an exception, and were not relevant to the interpretation of the Treaty's language. Each element of the government's position is erroneous.

1. *The Affidavits Are in the Record.* There can be no question that the affidavits in issue are properly part of the evidentiary record as they were presented to the trial court in a timly filed motion under R.U.S.C.C. 59(a).[20] As such they are part of the record on appeal

[20] *See also* Fed. R. Civ. P. 59(a). The government repeatedly emphasizes that Xerox' motion for reconsideration was filed five years after the decision of the Claims Court was issued. R.U.S.C.C. 59(a) and 83.2(f), however, prevented Xerox from filing its motion for reconsideration before a judgment was entered. The delay in entering a judgment resulted from the Treasury's failure to

under Fed. R. App. P. 10(a) ("The record on appeal includes all original papers and exhibits filed in the trial court . . ."). [21] Additionally, the trial court's order denying this motion was expressly designated, along with the judgment, in Xerox' Notice of Appeal.

2. *The Government Waived Its Evidentiary Objections.* If the government had any question as to whether Xerox' motion or its attached exhibits were properly part of the evidentiary record on appeal, the government failed to raise that issue as required under Fed. R. App. P. 10(e). Furthermore, the government joined with Xerox in filing a Joint Appendix for submission to the Federal Circuit which included these affidavits. Fed. R. App. P. 30(a) limits an appendix to items that are in the record on appeal. Also, the government's present challenge to the admissibility of these affidavits on hearsay grounds is not timely. Pet. at 26. The government failed to raise any hearsay objection to the admission of these documents in its response to Xerox' motion at the trial court level or in its submissions before the Federal Circuit. Accordingly, the United States has waived any objection it may have had on hearsay grounds. *Diaz v. United*

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issue regulations relating to the second issue in this case and the stay of further proceedings on Xerox' second issue until such regulations were issued. As noted above, Xerox finally was compelled to concede this second issue in order to proceed with its motion. Moreover, the government was not prejudiced by the delay because Xerox presented these affidavits and other exhibits in question to the Assistant Attorney General (Tax Division) on June 25, 1990 which was more than two years before Xerox filed its motion.

[21] One of the affidavits to which the government objects is an affidavit of Robert J. Patrick, Jr., principal U.S. negotiator of the Treaty. Pet. 12, footnote 10. However, this affidavit was admitted at trial under a joint stipulation in lieu of testimony pursuant to which the government waived all objections "except as to relevance." Resp. App. 30a. Also, this moots the government's objections to the affidavits of David Foster and Paul Oosterhuis, other U.S. government officials, because these two affidavits are only duplicative of Mr. Patrick's affidavit. Mr. Patrick's affidavit summarizing his views on the government's position in this case is set forth at Resp. App. 32a.

States, 223 U.S. 442, 450 (1912) (and cases cited therein) ("So of the fact that it was hearsay, it suffices to observe that when evidence of that character is admitted without objection, it is to be considered and given its natural probative effect . . . .") *See also* Fed. R. Evid. 103(a)(1); *United States v. Ruffin*, 575 F.2d 346, 355 (2d Cir. 1978) (hearsay objection to admission of IRS computer printout first raised on appeal ruled untimely where party's trial court objection was based solely on relevancy); *accord Wilner v. United States*, 994 F.2d 783, 786 (Fed. Cir. 1993).

3. *This Court's Decisions Have Accepted Statements Not in the Evidentiary Record for Purposes of Treaty Interpretation.* This Court and lower courts have shown a willingness to accept statements of treaty negotiators and other persons with first hand knowledge in construing a treaty even when such statements were not received into evidence at trial. Often it has been the United States that has presented such nontrial record statements. *Sumitomo Shoji America, Inc., supra*, 457 U.S. at 183-84 and n.9 (letter from a foreign government received into the record only a few days prior to oral argument before this Court); *Coplin v. United States*, 761 F.2d 688 (Fed. Cir. 1985) (statement of treaty negotiator received at appellate level and given great weight), *aff'd sub nom. O'Connor v. United States*, 479 U.S. 27 (1986); *Volkswagenwerk A.G. v. Schlunk*, 486 U.S. 694, 709 n.1 (1988) (Brennan, J. concurring, joined by Marshall, J. and Blackmun, J.) (citing a statement of a treaty negotiator regarding the meaning of a treaty in a law review article).

C. *Even if the Affidavits in Question Were Improperly Admitted, Other Competent Evidence Would Support the Same Conclusion.* The Federal Circuit's findings can be supported by other admissible evidence submitted by Xerox. The government pointedly does not address two other exhibits attached to Xerox' motion. These exhibits are the May 9, 1989 letter from Brian T. Houghton, Director of International Division, U.K. Inland Revenue,

to Xerox' counsel, and the July 31, 1992 letter from P. W. Fawcett, Assistant Secretary, International Division, U.K. Inland Revenue, to Xerox' counsel. Resp. App. 21a-24a and 25a-26a. Both letters, issued by government officials of the U.K., state that the contents of the letters are the official positions of the U.K. Inland Revenue, and confirm that the authors are authorized to write on behalf of the Commissioners of the Inland Revenue of the U.K. As such, both letters are issued by the officially designated Competent Authority of the U.K. under the Treaty. *See* Article 3(1)(f)(ii) of the Treaty. These two letters from the U.K. Competent Authority each reference and confirm the affidavits of Lord Rees (Resp. App. 39a-46a) and Rt. Hon. Denzil Davies (Resp. App. 33a-38a) which are the affidavits that seem to principally bother the government. Resp. App. 22a and 26a. Mr. Fawcett's July 31, 1992 letter states, with regard to whether the Treasury Technical Explanation was presented to the House of Commons, ". . . we have no reason to dissent from the statements as to this made by Lord Rees and Mr. Denzil Davies in their affidavits." Resp. App. 26a. Also, each of these Inland Revenue letters confirms, with regard to whether the Treasury Technical Explanation was incorporated into the terms of the Treaty, that "[s]o far as the United Kingdom is concerned, the negotiated agreement between the United Kingdom and the United States consist only of the double taxation convention and its amending protocols." [22]

The government contends that consideration of affidavits such as these would interfere with the proper function of treaty relations and would be an irritant in the administration of treaty affairs. Whether or not this could be the case need not be addressed here as the two letters of the U.K. Competent Authority dispositively re-

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[22] Mr. Fawcett's letter of July 31, 1992. Resp. App. 25a. Similarly, Mr. Houghton's letter of May 9, 1989 provides in this regard, "Certainly, ratification of the Treaty by the United Kingdom did not constitute acceptance by the United Kingdom of anything other than the terms of the Treaty itself." Resp. App. 22a.

solve the contentious issue of what the U.K. did and did not agree to in this case and confirm that the government's position in this case represents only its own interpretation of Article 23's language.

For each or any of these three reasons, there is no need for this Court to grant certiorari on the basis of the government's second question presented.

CONCLUSION

It is respectfully requested that the petition for writ of certiorari be denied.

Respectfully submitted,

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